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No. Mag. 138

Supreme Court of the United States

Brief of Davies for Opposition

OCTOBER TERM, 1899.

FILED
OCT 14 1899
JAMES H. McKENNEY,
Clerk.

No. 409.

Filed Oct. 14, 1899.

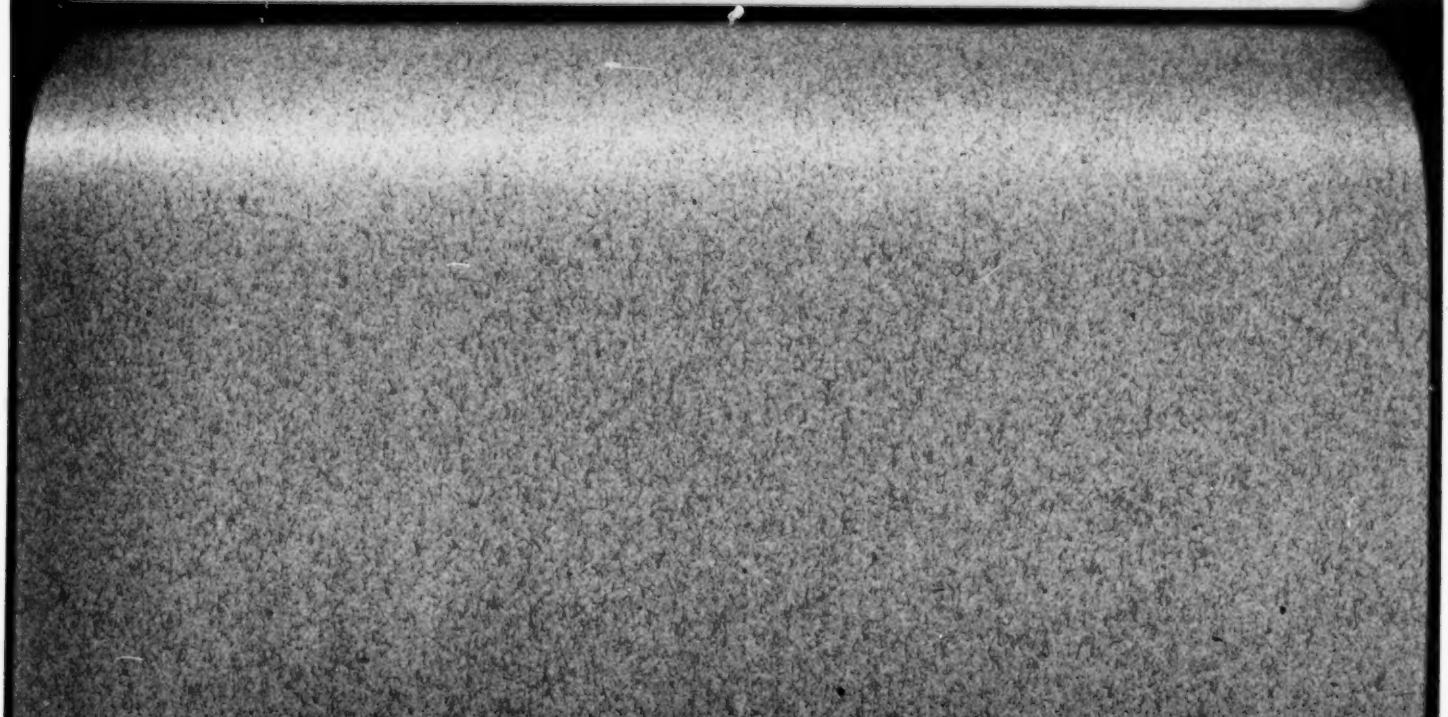
JAMES HOLLY, PETITIONER,

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND E. WALTER ROBERTS.

Brief in Opposition to Motion for Petition for Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

JULIEN T. DAVIES,
Of Counsel for Respondents.



Supreme Court of the United States,

OCTOBER TERM, 1899.

NUMBER 409.

JAMES HOLLY,
Petitioner,

against

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA, and E. WALTER ROBERTS,
Respondents.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner fails to show any ground for the writ of certiorari prayed for. Well-defined rules have been laid down relative to such applications, and it is no ordinary case that will be reviewed by this Court after final determination by the United States Circuit Court of Appeals. The rule has been stated by this Court in the following terms: that the power to grant such a writ "is a branch of its jurisdiction which should be exercised sparingly and with great caution and only in cases of peculiar grav-

ity and general importance, or in order to secure uniformity of decision." (*American Construction Co.* vs. *Jacksonville, &c., R'y Co.*, 148 U. S., 372, at 383.)

The Rule Governing such Applications.

The cases in which such a writ will be granted fall, therefore, into two classes:

1. Those of peculiar gravity and general importance; and

2. Those where it is necessary in order to secure uniformity of decision.

The cases falling in the second class are reviewed for the reason that since the nine Circuit Courts of Appeals are of equal dignity and jurisdiction, but are composed of a different personnel, conflicting decisions might readily arise unless such a provision were made. This is illustrated in the opinion in the case of *Smith* vs. *Vulcan Iron Works*, 165 U. S., 518, although even there this Court showed a disposition to restrict the granting of the writ within narrow bounds and refused to issue it on the ground that the admitted conflict of decisions in the different circuits did not materially affect the rights of the parties in the case then at bar.

In the case of *Forsyth v. Hammond*, 166, U. S., 506, litigations were pending between the parties in the Circuit Court of the United States and in the State Court of Indiana and opposite decisions as to their respective rights had been reached by the Circuit Court of Appeals for the Seventh Circuit and the Supreme Court of the State of Indiana. In view of this circumstance this Court considered it a proper case for review.

A precise definition of cases falling within the first class is from the nature of the case impossible; but has been illustrated by the cases brought into this Court.

It is probable that in every litigation the defeated litigant considers the cause as one of peculiar gravity, and the longer he dwells upon its gravity the more likely he is to become convinced that it is also of general importance. Upon no other theory can the present application be accounted for.

The cases in which this Court most readily exercises this power of review by reason of the peculiar gravity of the case and its general importance are those in which the relations of this Government or its citizens to a foreign Government are concerned. The first case in which such an application was granted was of this character. *Lau Ow Bew's Case*, 141 U. S., 583, and 144 U. S., 47. Of similar character was the case of *The Three Friends*, 166 U. S., page 1.

The case of "*The Conqueror*," 166 U.S., 110, was an application by the Attorney General for a writ of certiorari in a case where the interests of the United States were concerned, and such an application would obviously be more readily granted than in a litigation between private parties. An examination of all the instances in which the writ has been allowed during the last two years shows that almost one-third of the cases have been of this character.

The Application of the Rule to the Present Case.

In the case presented by this application the petitioner totally fails to show a case for the action of this Court.

There is no pretense that the decision of the Circuit Court of Appeals for the Second Circuit is in conflict with any decision of that Court for any other circuit. There is, therefore, no ground for reviewing this case in order to secure uniformity of decision.

The petitioner also fails to show that the cause is of peculiar gravity and general importance. It may be conceded that the cause is one of peculiar gravity to the petitioner, and everyone will accord him sympathy for his misfortune and regret that the confidence reposed by him in the agent of his own selection should have been misplaced. The result has proved a costly experience to him, and all will join in condemning the villainy of the embezzler who has brought this loss upon the petitioner.

It is not sufficient, however, that the cause should be one of peculiar gravity to the individual. All litigations may be said to be of that character. It must be of general importance to the community and of peculiar gravity not merely to the individual litigant, but by reason of its general importance.

The questions which the petitioner alleges are presented by this cause, and which he claims should be reviewed by reason of their gravity and general importance, are stated by him as follows:

"FIRST.—Can a party to whom the money of another is paid, if he does not give value therefor, retain the same against the rightful owner where he does nothing more than give a naked receipt therefor? and

"SECOND.—Can a legatee whose legacy is payable out

of funds of the estate, after loss of those funds, retain the moneys of a third person fraudulently misappropriated?"

In the first place, the questions as premised are academic. It is not made to appear, and the opinion of the Circuit Court of Appeals, as well as the record, shows that it is not the fact that either of these questions are involved in the controversy decided by that Court. Under the statutes and the decisions of the Courts of Pennsylvania the relation of debtor and creditor existed between the executor, Thompson, and the legatee, the Missionary Society.

Furthermore, even were these questions actually raised by the facts in the case, we submit that the questions are not of such character as to invoke the intervention of this Court. Were it otherwise, the rule heretofore prescribed by this Court must be wholly recast and restated.

In *Wood's Case*, 143 U. S., 202, the writ was refused, although the questions involved were quite as broad as in the present case and of similar gravity with those now presented.

Submitted herewith are copies of the brief filed by these respondents, upon the argument of the cause in the Circuit Court of Appeals for the Second Circuit, to which we respectfully invite the attention of the Court.

Dated New York, October 10th, 1899.

Respectfully submitted,

JULIEN T. DAVIES,
Of Counsel for the Respondents.